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In The
Supreme Court of the United States
October Term, 1975

No. 75-868

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,

Petitioner,

vs.

A. NEIL DAWES AND ALL EXTENSION EMPLOYEES AT THE UNIVERSITY OF NEBRASKA COLLEGE OF AGRICULTURE WHO ARE SIMILARLY SITUATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, The Board of Regents of the University of Nebraska, a public body corporate of the State of Nebraska, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 26, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at App. 3-App. 12 (Appendix Exhibit B). The opinion of the District Court for the District of Nebraska, not reported, appears in the Appendix hereto at App. 14-App. 33 (Appendix Exhibit C).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 26, 1975, and appears in the Appendix hereto at App. 1-App. 2 (Appendix Exhibit A). A timely petition for rehearing (an extension for filing the same having been given by the Court of Appeals) was denied on September 23, 1975, and appears in the Appendix hereto at App. 34 (Appendix Exhibit D). This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether an employer seeking to comply voluntarily with the broad anti-discrimination provisions of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2, violates the Equal Pay Act, 29 U. S. C. § 206 (d) (1), as to male employees, by making a single, equalizing salary adjustment

for certain female employees using a formula developed solely to measure and correct historic salary discrimination against females.

2. Whether an employer, which to comply voluntarily with the Civil Rights Act of 1964 develops and applies a salary adjustment formula for females not dependent upon substantial equality of work, is estopped from asserting that non-adjusted males who charge an Equal Pay Act violation did not perform "equal work."

3. Whether a one-time salary adjustment for certain female employees made for Civil Rights Act of 1964 purposes creates, in and of itself, a prohibited "wage rate" when male employees do not receive the same adjustment.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 206 (d) (1). Minimum Wage

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of produc-

tion; or (iv) a differential based on any factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

United States Code, Title 42:

§ *2000e-2. Unlawful employment practices—employer practices.*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . .

—o—

STATEMENT OF THE CASE

This action arose out of a one-time salary equalization study and adjustment by The Board of Regents of the University of Nebraska (the "University") in an attempt to identify and eliminate subtle historic sex-based discrimination in women employees' compensation. The jurisdiction of the district court was invoked because the question arises under a law relating to commerce, the Fair Labor Standards Act. The University brought suit for declaratory judgment seeking determination of the

rights and status of the parties under the Equal Pay Act of 1963, 29 U. S. C. § 206 (d) (1).[1]

The defendant male class, the respondent herein, is representative of all extension employees of the University of Nebraska's College of Agriculture whose compensation was less than it would have been for the 1972-73 fiscal year if the salary adjustment for *sex-based* discrimination had been applied to them. At the time that the equalization task was undertaken, the University's Colleges of Agriculture and Home Economics had approximately 516 academic-administrative and managerial-professional employees who were appointed as follows:

Twelve-month	456
Academic year	25
One-year special contract	4
Other	2
Twelve-month part-time	15
Academic year part-time	9
Visiting	2
Other part-time	3
TOTAL:	516

Of the total employees, 35 were administrative, 23 were department chairmen, 24 were assigned to a special facil-

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1 By order of the United States District Court for the District of Nebraska, on agreement of the parties, the matter was designated a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2). The defendant class counterclaimed and sought recovery for alleged unpaid wages, liquidated damages, interest and reasonable attorney fees. The University denied the class' claim and pled the defense of sovereign immunity under the Eleventh Amendment. The trial court held that the defendant class had not proved a violation of the Act and hence found it unnecessary to determine the Eleventh Amendment issue.

ity at Curtis, Nebraska, 3 were trainees, one person was paid entirely from sources other than the University of Nebraska, and one person was on special contract. Of these, 124 were women.

The University, acting through a special committee formed in the Colleges of Agriculture and Home Economics to identify and evaluate historical sex-based discrimination in women employees' compensation, developed two formulae using as a base the wages paid male employees performing certain jobs in the Colleges of Agriculture and Home Economics for the fiscal year 1971-72. These formulae were developed because the special committee formed to evaluate compensation being paid to men and women employees of the colleges found that a one-to-one comparison of jobs being performed by men and women was impossible and that only by classifying jobs broadly according to whether they were Academic-Research and Extension Specialist Staff ("Specialist Staff") or Extension Field Staff ("Field Staff") could the existence of historic sex-based discrimination in wages paid to women in the Colleges be ascertained and corrected.

The different factors which went into making up a formula for wages were assigned various estimated values based upon the study and evaluation of the special committee created in the Colleges for the wage equalization project. The committee determined that education, specialization, years of direct and related experience and merit were the factors which logically determined the male professional's salary. In order to assign a monetary value to these factors, the committee made a determina-

tion that Doctors of Philosophy with no experience should be valued at approximately $14,000. Of that $14,000, $8,000 represented the value of a Bachelor's degree, $2,000 represented the value of a Master's degree, $3,000 represented the value of a Doctor's degree and $1,000 represented the value of specialization. The portion of the salary allocated to education and specialization for each male was computed according to the above scale and totaled separately for the Specialist Staff and the Field Staff. These totals were then subtracted from the total salaries paid to the respective staffs. The remainders were considered to represent that portion of the total salaries attributable to experience and merit.

The committee developed a formula to express the average value of experience and medit for each of the staffs. The committee assigned three points for each year of direct experience and one and one-half points for each year of related experience. The number of experience points for each male was calculated and totaled separately for each staff. The committee divided the separate experience points of each staff by the respective total of the average individual annual performance ratings (merit) which were based on a one-to-five scale with one indicating the highest level of achievement.[2] The quotient gave the total "experience rating points" for the two staffs. The remainders representing the

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2 The individual annual performance rating is a consensus of the ratings made by a professional employee's immediate supervisor. The annual performance ratings are kept on file by the University personnel office.

portion of salary attributable to experience and merit were then divided by the respective totals of their "experience rating points" which resulted in allocating $120.00 for each "experience rating point" of a member of the Field Staff and $106.00 for each "experience rating point" of a member of the Specialist Staff.

These formulae, by which an annual individual female salary could be compared to a hypothetical weighted average male salary were, therefore, based on education, specialization, experience and merit. Assuming that "A" represents a base amount for Education; "B" represents an amount for Specialization; "C" represents Years of Direct Experience; 'D" represents Years of Related Experience; and "E" represents Merit (individual annual performance), the formulae used to adjust female salaries may be expressed as follows:[3]

SPECIALIST STAFF

$$A \text{ plus } B \text{ plus } \frac{(3 \times C \text{ plus } 1.5 \times D)}{E} \times \$106.00 = \text{SALARY}$$

FIELD STAFF

$$A \text{ plus } B \text{ plus } \frac{(3 \times C \text{ plus } 1.5 \times D)}{E} \times \$120.00 = \text{SALARY}$$

In summary, the formulae were created to quantify the component factors of diverse jobs, and provide a yardstick to measure possible discrimination. Actual salaries of females were then adjusted to formula level.

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3 For further discussion of the history and application of the formulae see the Appendix at App. 5-App. 9 and App. 14-App. 22.

The University undertook this rather difficult and complex task because of the experience of the University of Wisconsin which had been investigated and found in violation of the Civil Rights Act of 1964 by the United States Department of Health, Education and Welfare. President Varner of the University of Nebraska, fearing that his institution might have similar problems, determined to undertake a review of its salary structure and make such adjustment as necessary to eliminate subtle historic sex-based discrimination that might exist in the compensation paid to women employees.

Neither prior to nor after April, 1972, had any established method or formula for determining compensation for academic-administrative or managerial-professional employees been implemented by either of the Colleges involved herein (or the University generally). Starting salaries had been determined on a case-by-case approach by the Colleges, subject to appropriate campus and Board of Regents review. Historically such salaries were set by considerations such as education, special skill, experience, and, of over-riding influence, market conditions (supply and demand). Annual increases in both Colleges were generally based on merit, subject to the continuing influence of market conditions, and longevity, faculty rank, and the availability of funds as appropriated by the State Legislature. These factors, of course, caused salaries to vary widely from College to College and within given departments of each College.

The district court found that the defendant males (respondent herein) had failed to meet their burden of proof under 29 U. S. C. § 206 (d) (1) and that, therefore, the

University (petitioner herein) was not obligated to come forward to prove that any wage differential that may have existed was based upon a factor other than sex. Appendix at App. 28 and App. 32. The district court also entered judgment declaring that the University had not violated any of the defendant males' rights under the Equal Pay Act when it accorded certain women employees a one-time salary adjustment based upon the developed formulae. App. 28 and App. 32. In so ordering, the district court assumed *arguendo* "without deciding the point" that the women employees who received the July 1, 1972, adjustment and the male employees of the defendant class, on that date, held positions within the University which were substantially equal. Appendix at App. 29.

The Court of Appeals reversed stating that the defendant class had carried its burden of proof and established that members of the class had suffered unlawful discrimination. In so doing, the Court of Appeals held that the University, having established ground rules for determining whether women were being discriminated against, could not "now be heard to complain that some additional factors must be considered when the question is one of discrimination against male employees who are being paid less than the formulae minimum." Appendix at App. 10. The Court of Appeals made no findings as to the equality or substantial equality of the jobs performed by the men and women employed in the Colleges of Agriculture and Home Economics. Appendix at App. 8-App. 10.

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REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE EQUAL PAY ACT PORTIONS OF THE FAIR LABOR STANDARDS ACT, 29 U. S. C. § 206 (d) (1).

The decision below is an unwarranted setback to federal efforts to correct sex discrimination by employers. In effect, the Court of Appeals for the Eighth Circuit has eliminated from this Equal Pay Act case, where the University developed its own formula to correct patterns of historic discrimination, the "equal work" determination which is the core of the law. The appellate court's refusal to consider the statutory "equal work" criteria is directly contrary to prior decisions of this Court and every other Circuit Court of Appeals which has construed the Equal Pay Act.

At trial, the parties entered a stipulation indicating that the employees affected by the University's corrective pay increase had diverse combinations of duties, skills, efforts, responsibilities and working conditions. The Eighth Circuit not only ignored this stipulation but sanctioned the absence of any other proof or findings of equal work[4] based on job-to-job comparisons. Instead, the court

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4 The trial court had made no finding on the equality of work, since it did not reach that issue:

> **Without deciding the point,** the court will assume that the women employees who received the July 1, 1972, adjustment and the men who were members of the defendant class on that date held positions in the University of Nebraska establishment which were substantially equal. (Emphasis added.) Appendix at App. 29.

held that such comparisons were unnecessary in view of the salary adjustment formulae devised by the University. The Eighth Circuit so held despite the uncontradicted evidence that the formulae were derived solely to overcome the problems inherent in comparing employees in widely varied positions to comply with the Civil Rights Act of 1964.

Inexplicably, the Eighth Circuit ignored the express "equal work" criteria of the Equal Pay Act, instead deciding that because the University had voluntarily adopted its own salary adjustment formulae, it was estopped from relying upon the express statutory prerequisites constituting "equal work":

> It was the University, not the defendant class, that established the ground rules for determining whether women were being discriminated against. It determined the factors that were considered to be important for that purpose. It cannot now be heard to complain that some other additional factors must also be considered when the question is one of discrimination against the male employees who were being paid less than the formula minimum.

Appendix at App. 10.

Although the Court of Appeals agreed with the trial judge that the male employees had the burden to prove "equal work," the appellate panel dealt only parenthetically with that issue:

> [the male employees] further proved that at least ninety-two male professionals (*having substantially equivalent education, experience and merit*) were paid by the two colleges at a wage less than the minimum established for the females. This proof was sufficient to establish a violation of the Equal Pay Act. (Emphasis added.)

Appendix at App. 10.[5]

In effect, the Eighth Circuit held that the University's salary adjustment formulae equated with and replaced the definition of "equal work" in the Equal Pay Act, regardless of the purposes for which the formulae were developed (identification of and eradication of historical sex-based discrimination as prohibited under the Civil Rights Act of 1964). The court's own loose standard of "(substantially equivalent education, experience and merit)" is equally unprecedented. The most baffling aspect of the decision below, however, is the court's utter disregard for fact considerations of equality of skills, efforts, responsibilities and working conditions, which, until now, have been the crucial determinants in Equal Pay Act cases. The University's formulae compared wage levels notwithstanding job inequalities, and therefore make an absurd substitute for the statutory criteria.

The Court of Appeals for the Eighth Circuit's cursory dismissal of the "equal work" requirement of the Equal Pay Act of 1963 departs radically from previous judicial interpretations of that Act. The Act absolutely mandates that equal work be shown to establish a violation. 29 U. S. C. § 206 (d) (1). Until now, this Court and the Courts of Appeals have uniformly required careful, detailed fact-findings comparing the skills, efforts, responsibilities and working conditions of the jobs held by male

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5 The only other mention of the "equal work" requirement is a footnote referring to "ninety-two men who performed substantially equal work." Appendix at App. 11 n.10.

employees being compared with the jobs held by female employees. The Sixth Circuit, for example, has indicated that: "[a]dequate findings of fact by the trial judge are essential to the resolution of a dispute of this nature." *Hodgson v. Square D Company,* 459 F. 2d 805, 808 (C. A. 6 1972 (citation omitted). Similarly, in *Corning Glass Works v. Brennan,* 417 U. S. 188, 195 (1974), this Court held that the Secretary of Labor has the burden of comparability of working conditions in proving Equal Pay Act cases. The Act's legislative history clearly reveals that: "[i]t is not merely comparable skill and responsibility that Congress sought to address but, a substantial identity of job functions." *Hodgson v. Golden Isles Convalescent Homes, Inc.,* 468 F. 2d 1256, 1258 (C. A. 5 1972); *see generally,* Remarks of Congressman Goodell, 190 Cong. Rec. 9209. The record before this Court upon which the Eighth Circuit has found that the University violated the Equal Pay Act rights of the respondent class is devoid of any such detailed findings of fact on the specific points prescribed in the Act.

Courts have not limited application of the Act to exactly identical jobs but have, of course, extended its scope to cover positions which are "substantially equal." *Schultz v. American Can Co.-Dixie Products,* 424 F. 2d 356 (C. A. 8 1970). In so doing, however, the courts have not equated the phrase "substantial equality" with mere comparability. Instead the Equal Pay Act standards have been consistently construed to mean "substantial identity of job functions" whereby only differences in actual job performances which are inconsequential have been disregarded. *See, Schultz v. Wheaton Glass Co.,* 421 F. 2d 259, 265 (C. A. 3 1969), *cert. denied,* 393 U. S. 905 (1970);

Schultz v. American Can Co.-Dixie Products, supra, at 360; *Hodgson v. Fairmont Supply Co.,* 454 F. 2d 490, 493 (C. A. 1972); *Hodgson v. Corning Glass Works,* 474 F. 2d 226, 234 (C. A. 2 1973), *aff'd,* 417 U. S. 188 (1974).

In this case, the Eighth Circuit did not require the defendant class, the respondent herein, to prove the "substantial identity of job functions" or even that their jobs were "substantially equal" to jobs of female colleagues to whom the adjustment formulae had been applied. The record plainly shows that some male employees held positions which differed substantially from any position held by female employees and the record is further barren of proof as to the equality of skill, effort, responsibility or working conditions of any of the jobs held by the men and women in the Colleges of Agriculture and Home Economics. In contrast to prior Equal Pay Act cases, the Eighth Circuit's utter refusal to permit the employer to show these disparities between the jobs of male and female employees cannot be justified.

Finally, the decision's holding that the corrective pay increases for female employees created a "wage rate differential" is without support legally or factually. The trial judge correctly recognized that this one-time adjustment was not "the equivalent of a rate" and did not otherwise affect "the context of the historical pay practices of the University, which practices were to continue as in the past, with future increases to be determined on factors other than sex." Appendix at App. 32. Having ignored the statutory requirements of the Equal Pay Act in finding a violation of its provisions, the Eighth Circuit further ignored FED. R. CIV. P. 52(a) in rejecting the

trial court's findings of fact on this point and held the adjustment in fact to be a "salary schedule" or rate of pay. Appendix at App. 10.

This interpretation of "rate of pay" completely overlooks the corrective nature of the pay adjustment, whose target was subtle but years-old discrimination against women. Further, the record clearly shows, and the trial judge so found, an absence of any proof that "[the male employees were] paid at a lesser discriminate rate than that received by the women[.]" Appendix at App. 32.[6] In deciding that the formulae constituted a "rate of pay" the appellate court thus disregarded the employees' actual rate of compensation, which always has been the focal point of the Equal Pay Act cases.

2. THE DECISION BELOW THREATENS AND FRUSTRATES THE BROAD REMEDIAL PURPOSE OF THE EQUAL PAY ACT AND THE CIVIL RIGHTS ACT OF 1964 TO ERADICATE HISTORIC SEX-BASED DISCRIMINATION.

If allowed to stand, this decision jeopardizes employers' efforts everywhere to ameliorate subtle, historic sex-based discrimination forbidden by the Civil Rights Act of 1964. The decision below holds that such voluntary efforts to comply with the Civil Rights Act may be *per se* violations of the Equal Pay Act provisions of the

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6 The record shows that after the adjustment, the average men's compensation exceeded that of women in six of the nine academic ranks. Also, the average compensation of all male employees was $1,337.09 above the formulae level, while the average compensation of all female employees was $744.38 above the level determined by the formulae.

Fair Labor Standards Act. Employers in both the private and public sector thus are effectively discouraged from attempting to eliminate the vestiges of pre-existing sex discrimination in all but the most obvious situations. Further, all employers who have already made such corrective pay adjustments now face the prospect of protracted litigation by those who have not benefited from the adjustment. Such litigation will divert attention and valuable resources away from accomplishing the clear public purpose inherent in both the Civil Rights Act of 1964 and the Equal Pay Act of 1963. As has been legislatively intended and judicially recognized:

> The [Equal Pay Act of 1963] was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.

Schultz v. Wheaton Glass Co, supra, at 265; quoted with approval in *Hodgson v. Miller Brewing Co.,* 457 F. 2d 221, 225-6 (C.A. 7 1972).

This Court has likewise recognized, "The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill *the underlying purposes which Congress sought to achieve.*" *Corning Glass Works v. Brennan,* 417 U. S. at 208 (emphasis added). Here the Eighth Circuit has liberally construed the literal words of the Equal Pay Act to accomplish an absurd result, contradicting the legislative intent of both that act and the Civil Rights Act of 1964. In construing remedial statutes this court has always refused to follow their "plain meaning"

"[w]hen that meaning has led to absurd results" or results " 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Association*, 310 U. S. 534, 543 (1940) (citations omitted).

The Eighth Circuit's application of the Equal Pay Act, if allowed to stand, will estop the nation's employers from rooting out latent sex-based discrimination voluntarily for fear of precipitating a similar backlash Equal Pay Act claim by disconcerted male employees.

The record here clearly shows, and the trial judge so found, that the University, through the College's joint committee, carefully reviewed women's salaries to create formulae which would identify and eliminate historic discrimination due to sex. Because of past practices and wide diversity of jobs involved, it was impossible to measure precisely the effect of such past discrimination. Appendix at App. 17-App. 20. In attempting to reach substantial equality in compensation, without adoption of an inflexible pay scale (which was neither authorized nor budgeted for) the University sought a reasonable basis for comparing male and female employees. Now, as a result of these positive efforts, the University has been denied the essential protections provided to any employer under the Equal Pay Act of 1963, since it is estopped by the decision below from requiring that the complaining male class prove up a violation according to the express statutory requirements.

The shortsightedness of the Eighth Circuit's opinion is further evidenced in its treatment of the University's contention that the one-time salary adjustment was not a wage rate differential (Appendix at App. 10-App. 11). The

appellate court not only found that the salary adjustment was in fact a wage rate differential, but denied the University an opportunity to come forward at a hearing with proof that if the salary adjustment was a wage rate differential it was based on factors other than sex and, therefore, specifically exempted from coverage by the Equal Pay Act. *See*, e. g., *Hodgson v. Robert Hall Clothes, Inc.*, 473 F. 2d 589 (C. A. 3 1973). In *Robert Hall Clothes* the Third Circuit permitted the employer to show it was justified in paying different salaries to male and female employees in two departments having different profitability since such differential was a reasonable business judgment in view of profitability. Absent proof of any practice prohibited by the Act, and given "a congressional intent to allow reasonable business judgments to stand," *id.* at 597, the court deferred to the employer's business judgment. Contrary to the approach taken in *Robert Hall Clothes*, the Eighth Circuit in this record has made no attempt to reconcile the broad remedial sweep of the Equal Pay Act with any "business" realities which may confront the University in setting the wages of male and female employees of the Colleges of Agriculture and Home Economics.

It is a manifest injustice under the federal sex discrimination laws to find that the Board of Regents of the University of Nebraska has committed an Equal Pay Act violation in these circumstances. The result can only serve to impede the ascertainment and accomplishment of the objectives of both the Equal Pay Act of 1963 and the Civil Rights Act of 1964. All employers, public and private, will be understandably afraid to purge sex-based salary discrimination voluntarily because of the potential backlash Equal Pay Act claims asserted by those not benefited by corrective wage adjustments.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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December 17, 1975

APPENDIX

EXHIBIT A

(Filed August 26, 1975)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1974

No. 75-1126

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Appellee,

vs.

A. NEIL DAWES,
and all Extension Employees at the University
of Nebraska College of Agriculture who
are similarly situated,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

This cause came on to be heard on the original files of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause, be, and it is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

Costs taxed in favor of Appellants: August 26, 1975

Clerk's Docketing Fee:	$ 50.00
Costs of printing 10 copies of Appellants' brief:	$180.09
Total costs of Appellants for recovery from Appellee in the U. S. District Court:	$230.09

A True Copy.

ATTEST:

/s/ Robert C. Tucker
Clerk U. S. Court of Appeals,
8th Circuit.
September 30, 1975

EXHIBIT B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75-1126

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,

Appellee,

vs.

A. NEIL DAWES,
and All Extension Employees at the University of Nebraska College of Agriculture Who are Similarly Situated,

Appellants.

Appeal from the United States District Court for the District of Nebraska.

Submitted: June 13, 1975

Filed: August 26, 1975

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

This action arises out of a suit for declaratory judgment brought by the Board of Regents of the University of Nebraska (University) seeking a determination of the rights and status of the parties under the Equal Pay Act of 1963, 29 U. S. C. § 206(d)(1).[1] The essential issue is

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1 By order of the United States District Court, District of Nebraska, on agreement of the parties, the matter was designated a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)

(Continued on next page)

whether the University unlawfully discriminated against the male professional employees of the College of Agriculture and Home Economics when it sought to equalize salaries paid to the male and female employees of those colleges. The University established and put into effect a formula for determining a minimum salary schedule based on education, experience and merit for females then employed by the colleges but refused to put into effect the same formula for determining the minimum salaries of males then employed. We hold that this constituted unlawful discrimination and reverse the District Court.

In the spring of 1972, the University became aware of the problems encountered by the University of Wisconsin when it was investigated and found in violation of the Civil Rights Act of 1964. The University of Wisconsin was found to have unlawfully discriminated against women in setting salaries when it underwent a compliance review conducted by the United States Department of Health, Education and Welfare. The University, to avoid similar problems, determined to undertake a review of its salary structure and make such adjustments as necessary to eliminate salary discrimination based on sex in order to avoid the possible loss of federal funds. Directives were sent through administrative channels until they reached the Deans of the Colleges of Agriculture and Home Economics. These colleges referred the matter to a joint committee for study.

(Continued from previous page)

(2). The defendant class counterclaimed and sought recovery for alleged unpaid wages, liquidated damages, interest and reasonable attorney fees. The University denied the class claim and pled the defense of sovereign immunity under the Eleventh Amendment. The trial court held that the defendant class had not proved a violation of the Act and hence found it unnecessary to determine the Eleventh Amendment issue.

The committee, after intensive study, concluded that they could best determine whether inequities existed through a three-step process: first, identify comparable jobs; second, examine the salaries of the males and identify and assign a monetary value to the factors which went into determining their salaries; and third, compare the average male salary with individual female salaries based on a formula developed through the first two steps of the process.

In identifying comparable jobs, the committee decided that exact one-to-one comparisons were impractical. They determined that they could classify the employees according to whether they were Academic Research and Extension Specialist Staff or Extension Field Staff; *i. e.*, Specialist Staff or Field Staff.

In the second step, the committee determined that education, specialization, years of direct and related experience and merit were the factors which logically determined a male professional's salary. In order to assign a monetary value to these factors, the committee made a determination that Doctors of Philosophy with no experience were being hired at $14,000. Of that $14,000, $8,000 represented the value of a Bachelor's degree, $2,000 represented the value of a Master's degree, $3,000 represented the value of a Doctor's degree and $1,000 represented the value of specialization.[2] The portion of salary

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2 All Ph.D.'s were credited with $1,000 for specialization. The committee also credited personnel holding the position of County Agent Chairmen in the Field Extension Staff category with $1,000 for specialization although such personnel did not have Ph.D. degrees. The added amount in such cases represented administrative responsibility.

allocated to education and specialization for each male was computed according to the above scale and totaled separately for the Specialist Staff and Field Staff. Those totals were then subtracted from the total salaries paid to the respective staffs. The remainders were considered to represent that portion of the total salaries attributable to experience and merit.

The committee then developed a formula to express the average value of experience and merit for each of the staffs. The committee assigned three points for each year of direct experience and one and one-half points for each year of related experience. The number of experience points for each male was calculated and totaled separately for each staff. The committee then divided the separate experience points of each staff by the respective total of the average individual annual performance ratings (merit)[3] which were based on a one-to-five scale with one indicating the highest level of achievement. The quotient gave the total "experience rating points" for the two staffs. The remainders representing the portion of salary attributed to experience and merit were then divided by the respective totals of the "experience rating points" which resulted in allocating $120.00 for each "experience point" of a member of the Field Staff and $106.00 for each "experience rating point" of a member of the Specialist Staff.

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3 The individual annual performance rating is a consensus of the ratings made by a professional employer's immediate supervisor. The annual performance ratings are kept on file by the University personnel office.

The committee was then in a position to set forth a formula by which it could compare an actual individual female salary with a hypothetical average male salary based only on education, specialization, experience and merit. The formula can be expressed as follows:

Field Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$120.00\right] = \text{Salary}$$

Specialist Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$106.00\right] = \text{Salary}$$

A=Education; B=Specialization; C=Years of Direct Experience; D=Years of Related Experience; E=Merit (individual annual performance rating).

The committee performed the calculations for each of the one hundred twenty-five females and determined that thirty-three of the female employees were receiving less than the formula salary. The difference between formula and actual salary was considered the amount necessary to equalize male and female salaries.[4]

The committee completed its work in April of 1972. The University, then faced with the problem of what to do with the committee's findings in budgeting salaries for the fiscal year beginning on July 1, 1972, decided to implement the committee's findings. Accordingly, effective July 1, the salaries of the thirty-three females were

4 All of the committee's calculations were based on the 1971-1972 fiscal year salaries.

increased to the formula level. This "equalization" raise was to be effected prior to any other salary increases. The female professionals also received a $300.00 increase which had been mandated for male and female professionals by the legislature.

This process had a twofold effect: It established an "average"[5] male formula salary as the minimum salary for females and it left a number of males receiving less than the formula salary. In fact, of the two hundred seventy-two males whose salaries were used as the base, ninety-two of them received less than the formula.[6] It is these males who contend that the University has violated the Equal Pay Act by not applying the formula to them.

A resolution of this case depends upon a proper application of the Equal Pay Act. 29 U. S. C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a

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5 We use the term "average" guardedly since it is not the true average of the males but rather a weighted average. The education attainment and specialization factors distort the "average."

6 In the trial court's memorandum, it is stated that eighty-five males received less than the formula salary. This is apparently a typographical error. The correct figure is ninety-two.

seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The University contends that the male employees of the class have failed to establish by a preponderance of the evidence, that the female employees were compensated at a different rate, that they were employed in the same establishment, and that they were engaged in jobs, the performance of which required equal skill, effort and responsibility. It further argues that the thirty-three female professionals received a one-time salary adjustment and that henceforth it will return to its traditional method of salary determination—individual negotiation considering education, experience, special skill, merit and market conditions (supply and demand). Thus, the University contends that there was no violation of the Act.[8]

In our view, the defendant class has carried its burden of proof and has established that the members of the

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7 Congress amended the Fair Labor Standards Act, 29 U. S. C. § 213 (a), effective July 1, 1972, so as to eliminate the exemption provision which had provided that the sex discrimination provision of the Equal Pay Act, 29 U. S. C. § 206(d)(1) would not apply to professional employees.

8 We note that the evidence as to the existence of sex discrimination at the University of Nebraska prior to these events is conflicting. Dr. Virginia Trotter, former Dean of the College of Home Economics, contended at the trial that the committee had found discrimination. Dr. John Adams, Director of the Cooperative Extension Service and chairman of the committee, indicated that there has been no discrimination against females.

class were unlawfully discriminated against.[9] They proved that the University had established a minimum salary schedule for all presently employed female professionals in the Colleges of Agriculture and Home Economics and that at least thirty-three of that group were placed on that schedule. They further proved that at least ninety-two male professionals (having substantially equivalent education, experience and merit) were retained by the two colleges at a wage less than the minimum established for the females. This proof was sufficient to establish a violation of the Equal Pay Act.

It was the University, not the defendant class, that established the ground rules for determining whether women were being discriminated against. It determined the factors that were considered to be important for that purpose. It cannot now be heard to complain that some other additional factors must also be considered when the question is one of discrimination against the male employees who are being paid less than the formula minimum.

The University asserts that the "glaring fallacy" in the approach of the defendant class is that the formula does not represent the actual compensation paid to either male or female employees. It is in error in this assertion. On July 1, 1972, thirty-three women were placed on a step of the "salary schedule" consistent with their education, experience and merit rating solely because they were

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9 We agree with the University that the burden of proof rested on the defendant class even though the University had initiated the declaratory judgment action. Reliance Life Insurance Co. v. Burgess, 112 F. 2d 234 (8th Cir. 1940).

women and for no other reason—not because they had more administrative duties, taught more difficult subjects or worked harder and not because they were better teachers, researchers or field agents.[10]

It is, of course, true that there were and are male and female teachers who receive salaries in excess of those obtained by applying the formula. It may even be that a careful comparison of these professionals would uncover inequities as between the sexes, but we are not concerned with that problem on this appeal. It is not necessary to prove that all of the persons of one sex employed by a single employer are discriminated against to establish a violation of the law. It is sufficient to show that some are.

We, of course, do not hold or imply that a University must establish salary schedules or even minimum salaries.

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10 The trial court found that on July 1, 1972, the average male was paid $1,337 per year above the formula and that the average female was paid only $744.00 above the formula. It concluded from these averages that there was no violation of the Equal Pay Act with respect to the men. The averages, if correct, would be largely irrelevant since all the females were paid at least the minimum set in the formula and ninety-two men who performed substantially equal work received less than that minimum.

We also doubt the correctiveness of the averages. It appears that the average should be:

$$\frac{\$333,724 - \$85,000 = \$914.00}{272}$$

moreover, the average male salary was apparently computed to include the $300.00 legislatively-mandated increase while the average female salary was apparently computed without the increase.

We simply hold that when a University establishes and effectuates a formula for determining a minimum salary schedule for one sex and bases the formula on specific criteria such as education, specialization, experience and merit, it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula.

In the light of our decision, the other points raised at the University are without merit and need no discussion. We express no opinion as to the merits of the University's Eleventh Amendment defense as the trial court did not rule on the issue. The decision of the District Court is reversed and the case is remanded for action consistent with this opinion.

A true copy.

Attest:

/s/ Robert C. Tucker
U. S. Court of Appeals,
Eighth Circuit.

EXHIBIT C

(Filed January 2, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV73-L 190

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Plaintiff,

vs.

A. NEIL DAWES,
and All Extension Employees in the University of
Nebraska College of Agriculture who
are similarly situated,

Defendants.

JUDGMENT

Pursuant to the Order for Judgment entered in the above entitled matter,

IT IS ADJUDGED AND DECREED that the University of Nebraska's July 1, 1972 salary adjustments accorded certain women employees of the Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U.S.C. § 206(d)(1) rights.

IT IS FURTHER ADJUDGED AND DECREED that the defendants' counterclaim be dismissed.

Dated this 31st day of December, 1974.

/s/ PAUL BENSON
PAUL BENSON
United States District Judge

(Filed January 2, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 73L-190

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Plaintiff,

vs.

A. NEIL DAWES,
and All Extension Employees in the University of
Nebraska College of Agriculture who
are similarly situated,

Defendants.

MEMORANDUM OF DECISION
AND ORDER

NATURE OF THE CASE AND JURISDICTION

This action was brought as a declaratory judgment action under 28 U. S. C. § 2201 and § 2202. The Court has jurisdiction under 28 U. S. C. § 1337, as the action arose out of rights claimed under 29 U. S. C. § 206(d)(1). By order of the Court, on agreement of the parties, the matter was designated a class action pursuant to Rule 23(a) and Rule 23(b)(2), Federal Rules of Civil Procedure. Plaintiff is asking declaratory judgment as to the rights and status of the parties under the Equal Pay Provision of the Fair Labor Standards Act. Defendant class counterclaimed, and is seeking recovery for alleged unpaid wages, liquidated damages, interest, and reasonable attorney fees. In its reply to the counterclaim, plaintiff denies defendants' claim for monetary relief, and further

pleads the defense of sovereign immunity under the Eleventh Amendment to the Constitution of the United States.

FINDINGS OF FACT

The Court finds the facts as follows:

In the Spring of 1972, the University of Nebraska initiated a review of the salary structure for female academic and administrative employees in each of its various colleges. This review was motivated by the University's desire to comply with the Civil Rights Act of 1964, as amended and applied to Governmental Contractors via Executive Order No. 11246, and the attendant regulations promulgated thereunder, all of which do not allow discrimination in compensation based on sex. Compliance with the law would avoid potential imposition of governmental sanctions which might include the loss of federal funds.

The President of the University of Nebraska referred the matter to the President's Council to study, evaluate and eliminate any existing discrimination. Upon recommendation by the Council, a proposed evaluation and equalization program for women was implemented on March 24, 1972. A memorandum was sent to the Chancellor of each of the University of Nebraska System's three campuses, which directed each to proceed with the equalization of female employees' compensation with that of men and to attempt to adjust over a three year period, any existing disparities based on sex.

Chancellor James H. Zumbarge of the University of Nebraska — Lincoln campus responded on March 29, 1972,

by directing each of his deans to proceed with salary equalization, which included the College of Agriculture under Dean E. F. Frolik, and Home Economics under Dr. Virginia Trotter.

Attached to the directive was a memorandum from Vice President Howard Neville explaining that the President's Council has adopted a recommended plan of action aimed at discovering and systematically eliminating salary inequities between men and women in comparable positions. The College of Agriculture was directed to proceed to make a review of salaries under a set of general guidelines contained in the memorandum.

At the time the equalization process was instituted and during the time the plan was promulgated, the specific objective of the Colleges of Agriculture and Home Economics was to identify and eliminate any discrimination in compensation against women based on their sex. The Colleges were not charged or authorized to develop a uniform salary schedule as to all employees or to make any adjustments other than those necessary to eliminate sex discrimination. The basic approach was to compare average women's salaries with average men's salaries in comparative "job" groups. The "job" groups were based on University of Nebraska title code assignments and in the case of faculty groups, type of appointment was given consideration.

Consideration was also to be given to qualifications for specific positions. The end result would be a comparison of the average salaries of men and women with comparable qualifications in each "job" group. If the

average salary for women was less than the average salary for men, then a deficiency existed and a worksheet was to be completed. If the average salary was equal to or larger than the average salary for men, then no deficiency existed in women's salaries, and the evaluation was complete.

The Council realized that a considerable amount of subjective judgment would be required for the evaluation, but cautioned the colleges to avoid extremely precise comparative group distinctions, and to subject the final group definitions to a reasonable test.

At the time this task was undertaken, the University of Nebraska College of Agriculture and College of Home Economics had approximately 516 academic-administrative and managerial-professional employees who were appointed under eight different basic types of appointments, ranging from 12 month appointments to appointments as visiting personnel; they had varying educational backgrounds, varying experience and held a widely divergent range of job positions.[1]

1

12 month	456
Academic year	25
Other	2
One-year special contract	4
12 month part-time	15
Academic year part-time	9
Other part-time	3
Visiting	2
	516

Of the total employees, 35 were administrative, 23 were department chairmen, 24 were assigned to a separate facility at Curtis, Nebraska, 3 were trainees, 1 person was paid entirely from sources other than the University of Nebraska, 1 was on special contract and 124 were women.

No established method or formula for determining compensation for academic-administrative or managerial-professional employees had ever been implemented by either college, or by the University of Nebraska as a whole. Starting salaries for the College of Agriculture and the College of Home Economics had always been determined by the College Administration subject to approval by the Campus Chancellor and the approval by the Board of Regents. S t a r t i n g salaries for a given position were based on such factors as e d u c a t i o n, special skill, experience and were primarily influenced by market conditions relative to supply and demand for persons in the particular specialty desired. Annual increases in both colleges had been based largely on merit with consideration again being given to longevity, faculty rank, and legislative directives from the Nebraska State Legislature accompanying University appropriations. These determinations were, like starting salary, also influenced by the market conditions for a given specialty. Because of the historical compensation practice, salaries varied widely from college to college within given departments and even within various positions.

In the process of carrying out the task of equalization, the persons charged with the responsibility in the Colleges of Agriculture and Home Economics were faced with a two-fold inquiry.[2] First, it was necessary to de-

2 In attempting to identify and correct existing salary discrimination against women based on sex, Dr. Charles Adams, Acting Dean of the College of Agriculture, worked in cooperation with Dr. Virginia Trotter, Dean of the College of Home Economics and Associate Director of both the Agriculture Extension Service and the Experiment Station, Dr. Franklin Eldridge, Director of Resident Instruction for the College of Agriculture, Dr. Robert Kleis, Acting Director of the Experiment Station, and Mr. Charles Koopmann, Finance Officer of the College of Agriculture.

velop a method by which the extent of the existing discrimination against women, if any, might be determined, and secondly, it was necessary to provide some basis on which discrimination, if it was determined to exist, might be eliminated. It was not the intention of the Systems Administration, nor the Campus or College Administration, to attempt to abandon the past pay practices. None of the persons involved in the equalization process ever sought nor were they authorized to develop a single salary schedule which was to be uniformly applied to all academic-administrative or managerial-professional employees. In fact, they sought only to develop a means by which existing discrimination in the compensation of women might be discovered and eliminated. The adjustments once determined were to be made in the form of a one-time increase within the context of the pre-existing pay practice which would then continue as it had in the past albeit with a heightened emphasis on the prevention of any further discrimination based on sex.

In implementing the equalization program, it was determined that discrimination did exist. The Committee began a series of different analytical approaches to attempt to determine the extent of discrimination and a suitable system of salary adjustment. As a result of their deliberations, they finally developed a formula based on average male compensation. The formula which was derived attempted to assign relative values for education, specialization, experience and evaluated performance.

In its final form, the formula approach really encompassed two separate formulas. One was calculated for

all academic-research and extension specialist staff[3] and another formula was developed for extension field staff. Each formula was based on the compensation received by male employees in the respective job category during the 1971-72 fiscal year, including positions of County Agent-Home Economics, County Agent-Agriculture, and County Agent Chairman.

Having settled on this approach to salary equalization, the group comprised of Doctors Trotter, Adams, Klies, and Eldridge, with the assistance of Mr. Koopmann, then applied the appropriate formula to individual women employed in the respective positions. Each woman's compensation, calculated according to the appropriate formula was then compared to the amount which she had received for the 1971-72 fiscal year. The deficiency in compensation of each woman, if any, was then determined, and where necessary, an appropriate adjustment was made for equalization purposes. These adjustments

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3 Field Staff

$$8{,}000 \text{ (Bachelor degree)} + 1{,}000 \text{ for specialization} + 2{,}000 \text{ for M. S. degree} + 3{,}000 \text{ for Doctors degree}$$

$$\left[\frac{\begin{array}{l}\text{(3 X No. of years of Uni-}\\ \text{(versity Service or equivalent)}\\ \text{(service}\end{array} + \begin{array}{l}\text{(1½ X No. of}\\ \text{(years of similar}\\ \text{(experience}\end{array}}{\text{average rating}} \times 120\right]$$

Other

$$8{,}000 \text{ (Bachelor degree)} + 1{,}000 \text{ for specialization} + 2{,}000 \text{ for M. S. degree} + 3{,}000 \text{ for Doctors degree}$$

$$\left[\frac{\begin{array}{l}\text{(3 X No. of years of Uni-}\\ \text{(versity Service or equivalent)}\\ \text{(service}\end{array} + \begin{array}{l}\text{(1½ X No. of}\\ \text{(years of similar}\\ \text{(experience}\end{array}}{\text{average rating}} \times 106\right]$$

were then set forth on a separate worksheet headed, "The U of N - Worksheet for Reporting Inequities in Women's Salaries", as directed by Vice President Neville's memorandum.

By applying the formulas, the Colleges' Administrators sought to pinpoint those cases in which discrimination existed for female employees in the College of Agriculture and College of Home Economics, and measure the amount of increase necessary to eliminate that discrimination. No adjustment was made for women whose 1971-72 compensation was equal to or in excess of the appropriate formula compensation, and the formula was not applied, nor any adjustment made, for male or female employees in the following classifications:

1. Administrative
2. UNSTA—Curtis
3. Trainees
4. Persons paid from other sources
5. Persons on special contracts

As part of the regular budgetary process, the formula adjustments for women, together with general salary increase recommendations for the 1972-73 year, were forwarded to the Lincoln Campus Administration for their approval.

The formula was not used to determine the general increases of either men or women for the 1972-73 fiscal year, nor is it to be used as a method or formula or rate to determine future compensation for University employ-

ees. It was used as a one time only adjustment for a limited group of women employees.

In accord with the University of Nebraska budgetary system, equalization increases were approved and became effective for the fiscal year 1972-73 at its commencement on July 1, 1972. On that date there were approximately 391 males and 125 females employed by the College of Agriculture and College of Home Economics. There were 85 male employees whose 1972-73 compensation was below the formula by an aggregate amount of $85,000. In addition, there were approximately 180 men whose compensation exceeded the formula computation by an aggregate amount of $333,724[4] and 125 women whose compensation exceeded the formula rate by an aggregate amount of $93,048, and there were no female employees of the Colleges who were compensated at a level below the appropriate formula computation. Based on these figures, as of July 1, 1972, on the average, men were compensated at an average rate of $1337.09 above formula, while women were compensated at an average rate of $744.38 above formula. Further calculations show that following the formula adjustments, the average women's salaries were comparable to slightly below those of men's salaries.

In the process of making the formula adjustment for women in April of 1972, no adjustment was made for any of the employees located at the Experiment Station located in Curtis. In addition, no formula adjustment was

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4 The number of 180 men excludes persons in the following categories: administrative, UNSTA Curtis, trainees, retired persons, employees paid from other sources, persons on special contract, and persons who resigned.

made for any College of Agriculture Administrative employees, or for persons paid from other sources, and no formula adjustments were granted to any employees located at either the Boyd or Sherman County Experiment Stations.

The plaintiff is an employer within the definition of 29 U. S. C. § 203(d), and A. Neil Dawes and the class he represents are employees of the plaintiff, within the meaning of 29 U. S. C. § 203(e).[5]

A justiciable controversy arose when the 85 male employees, whose 1972-73 compensation was less than it would have been had the formula been made applicable

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5 29 U. S. C. § 203 as used in this chapter provides:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) 'Employee' includes any individual employed by an employer, except that such term shall not, for the purposes of subsection (u) of this section include—

(1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

(2) any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year."

to them, made a demand on the University for additional compensation based on alleged violation of 29 U. S. C. § 206(d)(1). The alleged violation is based on the act of the University in applying the formula to women and not to men.

BURDEN OF PROOF

Initially, a determination must be made as to where the burden of proof rests in this case. It is the position of the plaintiff that its declaratory judgment action is an attempt to "expedite and simplify the ascertainment of the uncertain rights of the parties" and that the defendants, by counterclaiming for unpaid wages, liquidated damages, interest and attorney fees, have the same burden of proof that the Secretary of Labor or a private employer would have if the claim of the class defendants had been instituted by them under 29 U. S. C. § 206.

It is plaintiff's position that the differential in pay to women is justified because the positions filled by the various personnel at the University of Nebraska College of Agriculture are jobs which do not require "equal skill, effort and responsibility, and which are performed under similar working conditions", and that the differential is based on a factor *other* than sex.

On the other hand, the defendant argues that a wage differential did exist and that it existed between employees of the opposite sex within the same establishment, and it existed with respect to employees who held jobs, the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions. It is undisputed that had the Secretary of Labor, or a p r i v a t e employee, instituted this

§ 206(d)(1) action under 29 U. S. C. § 204, the plaintiff would have the burden to prove by a preponderance of the evidence that those facts existed. Only after claimants' facts established a prima facie claim, would the burden of proof have shifted to the employer to demonstrate that the discriminatory differential, if established, was based on factors other than the sex of the employees. *Brennan v. Corning Glass Works,* 480 F. 2d 1254, 1258 (3rd Cir. 1973); *Hodgson v. Corning Glass Works,* 474 F. 2d 226, 231 (2nd Cir. 1973); *Schultz v. American Can Co.,* 424 F. 2d 356, 360 (8th Cir. 1970); *Hodgson v. Brookhaven General Hosp.,* 436 F. 2d 719, 722 (5th Cir. 1970). This burden is not placed on the plaintiff merely because it initiates the action. It is carried by the party seeking relief through the Fair Labor Standards Act.

In *Reliance Life Insurance Co. v. Burgess,* 112 F. 2d 234, 237, 238 (8th Cir. 1940), *cert. den.* 311 U. S. 699, *rehearing denied* 311 U. S. 730 (1940),[6] the Court had an opportunity to review the issue of where the burden of proof lies in a declaratory judgment action. There, an insurer had initiated an action for a declaration of nonliability under a double indemnity clause because of suicide. At the beginning of the trial, and in its instruction to the jury, the trial court ruled that the burden of proof was on the plaintiff, and the plaintiff excepted to these rulings. On appeal, the Eighth Circuit noted that:

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6 See also Royal Indemnity Corp. v. Wingate, 353 F. Supp. 1002 (D. Md. 1973); Sims v. Amos, 365 F. Supp. 215, 220, n.1 (D. Ala. 1973); Deere & Co. v. Sperry Rand Corp., 322 F. Supp. 397, 398 (D. Cal. 1970); Phillip A. Hunt Co. v. Mallenckrodt Chem. Works, 72 F. Supp. 865, 873-74 (D. N. Y. 1947); Preferred Acc. Ins. Co. of New York v. Grasso, 186 F. 2d 987, 991 (2nd Cir. 1951).

"The question as to who must sustain the burden of proof in a declaratory judgment suit is a comparatively new one, which we think does not admit of a categorical answer. It must depend, as in other cases of litigation, upon the condition of the pleadings and the character of the issues at the time the question is presented. Plaintiff alleged that the insured committed suicide while sane. It alleged an actual controversy, and the proceeding was instituted by it to determine that controversy. Defendant denied that a justiciable controversy existed and put in issue the allegations of plaintiff's petition, but they asked no affirmative relief but prayed only to be discharged with their costs. The question as to whether or not the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence. It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. It is generally upon the party who will be defeated if no evidence relating to the issue is given on either side.

. . .

"The Declaratory Judgment Act, 28 U. S. C. A. 400, 'did not create any new substantive right. It is procedural in nature, designed to expedite and simplify ascertainment of uncertain rights; and it should be liberally construed to attain that objective.' Ohio Casualty Co. v. Marr, 10th Cir., 98 F. 2d 973, 975. During the course of the trial, defendants offered evidence in support of their right to recover on the policies. When they thus became the actors, the burden of proof in its secondary sense—the obligation of going forward with the evidence—shifted to them, and

> they were obliged to meet with evidence the prima facie case created against them. In this sense the burden shifted from time to time as the trial progressed and the evidence was introduced by the respective parties. . . . " *Id,* at 237-238.

Writing in concurrence, Judge Sanborn expressed his view on the issue as follows:

> "My opinion is that the burden of proving the existence of the controversy was on the plaintiff, but that the burden of proving the fact upon which the defendants relied for the establishment of their right of recovery was upon them. I think it would be safe to say that when an actual controversy is presented to a court for adjudication through the medium of a suit for a declaratory judgment, the burden of proving, by a fair preponderance of the evidence, the existence of the fact or facts upon which the rights and liabilities of the parties depend is upon him who has the affirmative of the issue which forms the basis of controversy, without regard to whether he is plaintiff or defendant in the suit. . . . " *Id* at 240-241.

In this case, the burden is on the plaintiff to go forward with the evidence and prove the facts which caused a justiciable controversy to arise. The burden is on the class defendant to prove salary differential between the sexes in an integrated establishment among employees performing work of equal skill, effort and responsibiilty under similar working conditions. The burden would then shift to the plaintiff to prove that the differential was based on a factor other than sex.

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CONCLUSION

The Court concludes that the defendant has failed to carry its burden, and the plaintiff is entitled to the judgment of this Court declaring that the University of Nebraska's July 1, 1972, salary adjustment accorded certain women employees of the University of Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U. S. C. § 206(d)(1) rights.

RATIONALE

The equal pay provisions of the Fair Labor Standards Act, 29 U. S. C. § 206(d)(1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, r e d u c e the wage rate of any employee."

Section 213 of the Act initially exempted employees employed in executive, administrative or professional ca-

pacities from the provisions of § 206. Class defendants and the women who received the adjustment came within this exemption. Effective July 1, 1972, the same date the adjustment became effective, the exemption was removed.

The parties' briefs and arguments to the Court have centered on the matter of the salary adjustment that was extended to certain women employees of the University of Nebraska College of Agriculture and Home Economics, effective July 1, 1972, and whether the failure to apply to the men in the defendant class the same formula used in arriving at the salary adjustment for the women was a violation of § 206(d)(1). This approach to the litigation caused the parties to give exhaustive consideration to the issues of whether the men and women employees were engaged in jobs which required equal skill, effort and responsibility, performed under similar working conditions; whether the application of the formula to women only resulted in a differential; and whether the differential, if any, was a sex based discrimination, or based on a factor other than sex.

Without deciding the point, the Court will assume that the women employees who received the July 1, 1972, adjustment and the men who were members of the defendant class on that date held positions in the University of Nebraska establishment which were substantially equal.

Commencing on July 1, 1972, those employees came under the provisions of § 206(d)(1). On that date, they were being paid unequal salaries, which inequality was the result of the many factors that went into the matter of compensation to be received by an individual employee.

One of these was special skill and experience possessed by the individual, and another was longevity with the institution. Those who joined the faculty at different times came in with different starting salaries, frequently dependent upon the supply and demand of the specialties involved and the educational achievements of the employee. Over the years variable increases were granted, depending upon availability of resources, economic conditions and merit. An additional factor affecting the salary to be paid some of the women employees effective July 1, 1972, was the formula adjustment, which resulted in this lawsuit. However, the adjustment was just one of the many composite factors that, taken together, resulted in the total compensation package that existed as to each of these women employees on the date they came under § 206. The formula is not a continuing formula, and there is no evidence the University has any established method or formula determining future compensation.

The thrust of § 206(d)(1) is to prohibit a differential based on sex. Under the assumption that the employees' positions were substantially equal, if such a differential existed, it would be a prohibited discrimination. A simple example of such discrimination would be the simultaneous hiring of a man and woman of equal qualifications to fill two identical positions in the same establishment, and paying one at a rate less than the other.

At the time the formula was devised and the decision made to apply it, the University, in its employer-employee relationships in the two colleges involved in this case, was not subject to § 206(d)(1). It was, however, subject to

the provisions of 42 U. S. C. §§ 2000e et seq., the Civil Rights Act of 1964,[7] which prohibited sex discrimination in wages, and the University was concerned with whether it was in compliance. The formula was devised and applied to cure past subtle discriminations against the women employees which the University determined had existed. The finding by the University that such discrimination existed is not subject to review here, because it is not relevant to the issue before the Court.

The issue here, as the Court conceives it, is whether under the plain wording of the statute, the defendant class men employees on July 1, 1972, were being paid compensation at a rate less than that being paid the women employees. The burden to establish the affirmative of that issue is on the defendant, and he has not carried it. The defendant has not endeavored to establish that on July 1, 1972, he and his class were being paid at an actual *rate* less than the rate paid to the women who received the adjustment. To recover, he must establish that fact as the Court views such proof as basic to defendants' cause of action on the counterclaim. Defendants proved that the individual members of the class would have received more pay than they are now receiving if the formula had been applied to them, but the Court will look only to the total pay received by the employees at the moment the col-

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7 "§ 2000-2. Unlawful employment practices—Employer practices.
(a) It shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

leges became subject to the act. Assuming substantially equal jobs, if there was an existing differential in actual pay received on July 1, 1972, the Court would then look to whether that differential was the result of a rate based on sex discrimination. The evidence established that on July 1, 1972, the average compensation of the male employees in the two colleges was $1,337.09 above the formula, and the average compensation of the women employees was $744.38 above the formula.

The formula, under the facts of this case, is not the equivalent of a rate. It was a one time only adjustment, which was made to cure a discrimination which the University found existed. As such, it was a one time increase limited to certain employees and did not otherwise effect the context of the historical pay practices of the University, which practices were to continue as in the past, with future increases to be determined on factors other than sex.

To summarize, in its disposition of this litigation, the Court has decided the case on a very narrow factual issue. Assuming that on July 1, 1972, members of the defendant class, and the women who received the adjustment, held substantially equal positions in the University of Nebraska establishment, was the defendant and his class being paid at a lesser discriminate rate than that received by the women? There is no proof before the Court that they were.

In view of the holding herein, consideration of the Eleventh Amendment issue is not necessary.

ORDER FOR JUDGMENT

IT IS ORDERED that judgment be entered declaring that the University of Nebraska's July 1, 1972, salary adjustments accorded certain women employees of the Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U.S.C. § 206(d)(1) rights.

IT IS FURTHER ORDERED that the defendants' counterclaim be dismissed.

Dated this 31st day of December, 1974.

/s/ Paul Benson
PAUL BENSON
United States District Judge

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1975

No. 75-1126

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Appellee,

vs.

A. NEIL DAWES,
and All Extension Employees at the University of
Nebraska College of Agriculture
who are similarly situated,

Appellants.

Appeal from the United States
District Court for the
District of Nebraska

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 23, 1975